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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 791

HARRY WALLERSTEIN, RECEIVER OF TELEVISION COMPANY OF AMERICA, INC., ALEX GOLD AND ROBERT W. HUGHES, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals (Pet. App. i-ii) is unreported. The hearing examiner's initial decision (J.A. 13-108)[1] is reported at 5 Pike & Fischer R.R. 2d 821. The decision of the Federal Communications Commission (J.A. 270-281; Pet.

[1] "J.A." refers to the joint appendix in the court of appeals.

App. iv-xiv) is reported at 1 F.C.C. 2d 91. The Commission's memorandum opinion and order denying petitions for reconsideration, rehearing, and to open the record (J.A. 307-315) are reported at 6 Pike & Fischer R.R. 2d 506.

JURISDICTION

The judgment of the court of appeals (Pet. App. i-ii) was filed on June 20, 1966. A petition for rehearing *en banc* was denied on August 15, 1966. On November 15, 1966, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 28, 1966. The petition was filed on November 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly denied applications to renew the license and transfer control of a television station, when material facts pertaining to the station's ownership were misrepresented or concealed.

2. Whether the court of appeals correctly refused to consider petitioners' claim of disparate treatment because they had not first presented that claim to the Commission.

3. Whether the Commission's action was improper because the television station was being managed by a receiver in bankruptcy under Chapter 11 of the Bankruptcy Act.

4. Whether the Commission abused its discretion in refusing to reopen the record for additional evidence, which petitioners could have offered before the hearing examiner.

STATUTES INVOLVED

Section 310(b) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 310(b) provides in pertinent part:

> (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. * * *

Section 405 of the Communications Act, 48 Stat. 1095, as amended, 47 U.S.C. 405 provides in pertinent part:

> The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review * * * (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. * * * Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evi-

dence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. * * *

STATEMENT

After full administrative proceedings, the Federal Communications Commission denied three pending applications pertaining to Channel 13 in Las Vegas, Nevada (J.A. 270-281). The applications sought (1) renewal of the license of the Television Company of America ("TCA"), now assigned to Harry Wallerstein, TCA's receiver in bankruptcy, to operate television station KSHO-TV on Channel 13; (2) reassignment of the receiver's license back to TCA; and (3) transfer of control of the Nevada Broadcaster's Fund, Inc. ("the Fund"), a holding company which owns TCA, to Arthur Powell Williams (J.A. 14). The Commission found, as recommended by its examiner (J.A. 13-100), that individuals associated with TCA had misrepresented or failed to disclose material facts relating to the ownership and control of the station.[2]

The Fund, which was organized to acquire the television station,[3] agreed to buy TCA from its own-

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[2] The application seeking to transfer control of the Fund was filed by Reed R. Maxfield, Robert W. Hughes, Carl A. Hulbert and Alex Gold. The Commission held that Maxfield and Hulbert had no interest to transfer and that their names on the application were used simply to conceal further the misrepresentations and non-disclosures it found (J.A. 93-94, 99-100, 270, 271 n. 1).

[3] Petitioner Hughes was the principal organizer of the Fund.

ers in February 1959 (J.A. 18-19). Pending final transfer, the Fund also agreed to advance sufficient funds to meet the station's operating expenses. The sales agreement was not submitted to the Commission until nearly a month after the 30-day filing date provided by the Commission's rules (47 C.F.R. 1.613), and the collateral agreement relating to operating expenses was never disclosed (J.A. 19-20, 95). As the Fund was unable to perform this agreement because it lacked sufficient capital, the parties made a new sales agreement in July 1959. The application to the Commission for approval was filed late, but the date on the contract was altered to create the appearance of compliance with the 30-day filing requirement (J.A. 25-26, 95). In addition, certain ownership and financial data contained in the application were falsely reported (J.A. 28-33, 96). Nevertheless, unaware of the misrepresentations, the Commission approved the transfer of control to the Fund on November 4, 1959 (J.A. 33, 96-97), and the transfer was consummated the following month.

After the Commission's approval, various changes in the ownership of the Fund's stock occurred—commencing in the period prior to consummation of the transfer and continuing thereafter. However, the ownership reports filed with the Commission by petitioner Gold [4] on behalf of the Fund and TCA never reflected the true ownership of the Fund's stock (J.A. 68-70, 97, 103).

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[4] At the time of these filings, petitioner Gold was both general manager of KSHO-TV and president of the Fund (J.A. 69).

Between March and August 1960, KBLI, Inc., a corporation controlled by Howard Johnson, bought a controlling interest in the Fund (J.A. 37-40). Johnson instructed petitioner Hughes, who is also his attorney, to file an application with the Commission for transfer of the station's control to KBLI. Hughes advised that the application would not be approved because KBLI was not financially qualified (J.A. 42, 49, 99). KBLI's controlling interest was not disclosed to the Commission until the hearing in this case in 1964.[5]

On May 1, 1961, TCA petitioned for an arrangement under Chapter 11 of the Bankruptcy Act, 11 U.S.C. 701-799 (J.A. 57-58). The following month, Arthur Powell Williams reached final agreement with KBLI and other Fund shareholders to purchase KSHO-TV (J.A. 52-54).[6] The three applications involved here were filed with the Commission in order to implement this agreement. On three separate occasions during the proceedings on these applications, the Commission received untruthful stock ownership reports; it did not learn the true facts until the evidentiary hearing (J.A. 64-67, 70-78, 100-101).

The Commission found that petitioners' misrepresentations and non-disclosures "were the result of the

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[5] During this same period, KBLI declared its controlling interest in the Fund to the Securities and Exchange Commission and the Idaho Securities Commission (J.A. 41, 43, 98-99).

[6] Although a party in the original Commission proceedings, Williams did not appeal and is therefore not a party in this Court.

almost incredibly lax manner in which the affairs of the business entities involved were conducted * * *." It also found that "a policy of deliberate concealment of the KBLI, Inc. interest was initiated and maintained" (J.A. 274, 275). The three applications were denied (J.A. 277). Following the decision, the receiver and petitioners Hughes and Gold petitioned for reconsideration, rehearing, and to open the record (J.A. 282-291, 292-306). The Commission denied these requests (J.A. 307-315). On review, the court of appeals affirmed the Commission's decision, *per curiam* (Pet. App. i-ii).

ARGUMENT

Petitioners present no issue warranting review by this Court.

1. Relying on *Melody Music, Inc.* v. *Federal Communications Commission*, 345 F.2d 730 (C.A.D.C.), petitioners contend that the Commission's action was invalid because the agency failed to distinguish this case from other cases[7] in which it has renewed licenses. But *Melody Music* held only that the Commission must explain why parties to the same misconduct—there, "fixing" a particular quiz program—were treated differently in contemporaneous pro-

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[7] *General Electric Co.*, 2 Pike & Fischer R.R. 2d 1038; *Westinghouse Broadcasting Co.*, 22 Pike & Fischer R.R. 1023; *NBC, Inc.*, 37 F.C.C. 427; *Melody Music, Inc.*, 2 F.C.C. 2d 958; *The Noble Broadcasting Corp.*, 1 F.C.C. 2d 154; *Lee Broadcasting Co.*, F.C.C. Mimeo No. 58458.

ceedings. That case is plainly inapposite here.[8] The Commission is not precluded from adopting a valid remedy to redress a licensee's misrepresentations because it has in the past applied a less stringent remedy in some other misrepresentation cases. As this Court held in *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228, the Commission is not bound in misrepresentation cases "to deal with all cases at all times as it has dealt with some that seem comparable." The Commission's decision not to renew the license in this case is amply justified by petitioners' demonstrated misconduct and lack of candor, and is neither unreasonable nor unprecedented.[9]

2. The court of appeals correctly refused to consider the merits of petitioners' "disparate treatment" argument because they had not given the Commission an opportunity to pass on it before seeking judicial

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[8] It should be noted that Chief Judge Bazelon, author of the *Melody Music* opinion, was a member of the panel that decided this case.

[9] See, *e.g.*, *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Lorain Journal Co.* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A.D.C.), certiorari denied, 383 U.S. 967; *Robinson* v. *Federal Communications Commission*, 334 F. 2d 534, 536 (C.A.D.C.), certiorari denied, 379 U.S. 843; *Pinson* v. *Federal Communications Commission*, 321 F. 2d 372 (C.A.D.C.); *Immaculate Conception Church of Los Angeles* v. *Federal Communications Commission*, 320 F. 2d 795 (C.A.D.C.), certiorari denied, 375 U.S. 904.

In none of the cases cited by petitioners, see note 7, *supra*, did the applicant engage in a deliberate refusal to comply with statutory disclosure requirements essential to the Commission's regulatory responsibilities, as petitioners did here. See *Lorain Journal Co.* v. *Federal Communications Commission*, *supra*, 351 F. 2d at 830.

review (Pet. App. i-ii). In their request for reconsideration, petitioners Hughes and Gold simply referred to other Commission decisions (n. 7, *supra*) and "submitted that the Commission recognized the equities in [those] cases and should in this matter" (J.A. 300). They did not claim disparate treatment or invoke *Melody Music*, which had been decided some four and a half months earlier. Petitioners had ample opportunity to argue their claim of disparate treatment to the full Commission, but failed to do so. Having failed to present the issue to the Commission, they are barred from raising it before the reviewing court. See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-500; *United States* v. *Tucker Truck Lines*, 344 U.S. 33; Communications Act of 1934, § 405, as amended, 47 U.S.C. 405; Administrative Procedure Act, § 10(e), 5 U.S.C. 706; 3 Davis, *Administrative Law Treatise*, § 20.06 (1958).

3. Petitioners urge that the Commission's refusal to grant their application frustrated their pending proceeding under Chapter 11 of the Bankruptcy Act (Pet. 41-43). But the bankruptcy proceedings in no way controlled the license-renewal proceedings involved here, and the Commission properly declined to "renew the license of an unfit licensee merely because the District Court has rendered it viable financially" (Pet. App. x). It would be anomalous indeed to require the Commission to renew a license tainted by misrepresentation and concealment when the

guilty parties were still associated with the station involved, simply because the licensee is in financial difficulties. While bankruptcy proceedings leading to liquidation have been held to render past licensees' misconduct immaterial (*Twelve Seventy, Inc.*, 2 F.C.C. 2d 973; *Arthur A. Cirilli, Trustee in Bankruptcy*, 2 F.C.C. 2d 692), in those cases the persons responsible were completely disassociated from the station involved and could not benefit from the liquidation. Here, the guilty persons have continued their association with the station and one of the applications is to transfer the license from the receiver to the debtor corporation, which they still dominate and control. Under these circumstances, it was appropriate for the Commission to take account of the character and qualifications of petitioners in making its determination.

4. Petitioners' other contentions are not substantial. They object to the Commission's refusal to reopen the record to receive evidence concerning the scope, quality and nature of Station KSHO's broadcast service (Pet. 32-33). But petitioners had every opportunity to develop a record on the station's past broadcast performance either before the examiner or before the Commission by timely applying to the Commission for enlargement of the hearing issues.[10] Surely, the evidence was not unavailable at the time of the hearings. See 47 U.S.C. 405.

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[10] This was the procedure followed in *E. G. Robinson, Jr.*, 21 Pike & Fischer R.R. 569, 572, and *Melody Music, Inc.*, 22 Pike & Fischer R.R. 870, 871.

Similarly, the Commission's refusal to reopen the record to add testimony by a former attorney for the Fund concerning the preparation of documents and reports was proper and not unreasonable. The Commission correctly ruled that petitioners' wrongful conduct, amply supported by the record, "cannot be attributed to their attorney" (J.A. 309).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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